Supreme Court, U.S.
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No. 06-470

IN THE

Supreme Court of the United States

ONEIDA INDIAN NATION OF NEW YORK,

Petitioner,

-v-

SCOTT PETERMAN, UPSTATE CITIZENS FOR EQUALITY, INC., AND PERSONS AND ENTITIES SIMILARLY SITUATED, and HON. DAVID TOWNSEND, a duly elected official of the New York State Legislature,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondents do not deny that the New York courts have adopted and applied to the Oneida Indian Nation of New York ("Oneida Nation" or "Nation") a legal rule that an important tribal right under federal law can be adjudicated in the tribe's absence, and, notwithstanding the Nation's sovereign immunity, on the ground that the tribe can always protects its interests by waiving immunity and intervening. They also do not dispute that the New York rule conflicts with this Court's decision in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986), and with the unanimous view of the federal courts, nor do Respondents dispute that state courts are divided on the significant issues regarding the state recognition of tribal sovereign immunity presented in this case. (see Petition, pp. 13-17). They offer no legitimate reason for this Court to deny the petition.

I. *City of Sherrill v. Oneida Indian Nation of New York* Does Not Render The Issue In This Case Moot.

Respondents complain that the Petition does not address the import of this Court's recent decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). *Sherrill* has no bearing on the question presented in this Petition: whether New York may adopt a rule that eviscerates federally protected sovereign immunity. *Sherrill* certainly does not render the issue presented here moot or "academic," Brief in Opposition ("BIO") at 3, nor does it affect this case in any way that would complicate this Court's review.

Sherrill did not extinguish the Nation's interest in the validity of its gaming compact. Contrary to Respondent's suggestion, the governor's approval is not needed before gaming will be allowed on land held in trust by the United

States for the benefit of the tribe. BIO at 3. Consent is not required for gaming on lands located within or contiguous to the boundaries of the Oneida's reservation as they existed on October 17, 1988, 25 U.S.C. § 2719 (a), as the land on which Turning Stone is situated certainly is. *Sherrill,* 544 U.S. at 216 n. 9 (leaving undisturbed the Second Circuit's ruling that the reservation was not "disestablished"). For the same reason, Turning Stone is Indian land "within the limits of [the Oneida] reservation" for purposes of federal authority under IGRA, 25 U.S.C. § 2703(4), even if the Nation cannot assert its sovereignty or tax immunity over the land. *See also* 544 U.S. at 221 (citing "on reservation" trust regulations, 25 CFR § 151.10, as applicable to Nation's land). Gaming under an approved compact is lawful on Indian land as defined by IGRA. Finally, whatever the import of *Sherrill* on the reservation land at issue in that case, it has no impact on the "historic 32-acre reservation." 544 U.S. at 207. Any impact from a determination that the Nation's compact has no legal force, however, would apply to all of the Nation's lands, including the "historic 32-acre reservation."[1]

II. The Issue Presented In This Case Is Significantly Different From That In *Saratoga County Chamber Of Commerce v. Pataki.*

The categorical rule applied to the Nation in this case is significantly different from the New York Court of Appeals' application of state indispensable party rules in *Saratoga County Chamber of Commerce v. Pataki*, 100

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[1] As support for their argument about the legality of gaming, Respondents refer the Court to a letter from the governor's counsel to federal officials date May 13, 2005. (BIO App. C). That letter is not in the record, and is not properly before the Court. It is noteworthy, however, that Respondents do not suggest that federal officials have agreed with the analysis presented in that letter, which is in conflict with the plain terms of IGRA.

N.Y.2d 801, 798 N.E. 2d 1047 (2003), which this Court declined to review, 540 U.S. 1017 (2003).

First, *Saratoga* prospectively resolved an open question of state constitutional law: whether the governor of New York needed legislative approval to execute a gaming compact with an Indian tribe under IGRA. The state Court of Appeals emphasized the importance of resolving that question to provide future guidance for state officials. 100 N.Y. 2d at 814, 820 (if review were denied, "an important constitutional issue would be effectively insulated from judicial review"). This Court (Ginsburg, J.), denied a stay in *Saratoga* on the understanding that the effect of the New York Court of Appeals' decision in that case was simply to clarify the authority of the governor under state law, not to threaten the continuing operation of the Mohawks' casino (as has proved to be the case).

The issue presented here is significantly different. Respondents' goal was not to resolve a question of state constitutional law, which already had been resolved in *Saratoga,* but to affect the rights of the Nation under a compact that had been approved by the federal government many years earlier. The denial of review in *Saratoga* says nothing about the need to review this judgment, entered in derogation of tribal sovereign immunity for no purpose other than to alter the tribe's ability to operate a casino under its federally-approved compact.

Second, the rule announced by the courts in this and other recent New York cases is not limited to the circumstances presented in *Saratoga,* where the court found a compelling need to resolve a significant state constitutional issue to provide guidance for state officials. Rather, the New York courts have announced and followed a *categorical rule* that Indian tribes are not indispensable to a suit affecting their rights because they can protect their rights by waiving

sovereign immunity and entering the litigation. That rule is a significantly greater affront to federal supremacy than the ruling in *Saratoga.*

Third, in *Saratoga*, the State vigorously defended the validity of the compact under the State constitution, on state law *laches* and standing grounds, and on the ground that state court review of the gaming compact was preempted by federal law. One could therefore argue, that in *Saratoga*, the New York Court of Appeals had the benefit of a full adversary presentation of the state and federal issues and that the Mohawk tribe's interests were adequately represented by the State.

That conclusion is impossible to reach in the present case because the State flatly refused to present a *laches* defense based on Respondents' nearly six-year delay in filing their state court challenge after the Nation's casino facility opened, a defense that was significantly stronger than the *laches* defense in *Saratoga,* where the suit was filed soon after the Mohawk casino first opened in 1999.[2] The State also

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[2] Contrary to Respondents' claim, the Nation did not "take a risk" in building Turning Stone before it was clear whether gaming was legal under the compact. BIO at 13. Before the Nation began construction of Turning Stone, the Nation's compact had been approved by the Secretary of the Interior and was therefore "in effect" under IGRA. 25 U.S.C. § 2710 (d)(1)(C). No further approval was necessary to determine that gaming was legal at Turning Stone. The memorandum from former Governor Mario Cuomo's counsel addressing the need for legislation to implement the compacts has nothing to do with "warn[ing] . . . that the Compact was vulnerable to legal challenge" on state separation of powers grounds. BIO at 3. In fact, as is clear from the face of the memorandum, BIO App. D, the concern was the need for legislation to implement certain aspects of the state's regulatory duties under the compact, not making the compact valid. The memorandum is explicit that the consequence of failing to pass implementing legislation would be "unregulated gaming," not illegal gaming. In addition, the state legislature passed the legislation to implement the compact that is discussed in the memorandum. The New York Court of Appeals misread this memorandum (written after the

refused to challenge the Respondents' standing to sue under New York's "taxpayer standing" law, which requires a fiscal nexus, even though there was no nexus whatsoever between any state expenditures and the absence of legislative approval: the legislature has annually approved the expenditure of funds to oversee the Nation's casino under the compact, and has continued to do so notwithstanding *Saratoga*.

The State's refusal to defend the compact meant that the state court did not have the benefit of an adversary presentation on the merits. The Nation's appearance was for the limited purpose of asserting its immunity as a bar to the suit. It therefore could not present the substantive arguments against Respondents' suit. Because the State abandoned its objections to Respondents' suit, there was no presentation or litigation of the substantial state and federal arguments against the declaratory judgment Respondents' sought.

Finally, the Oneida Nation's submission of an *amicus curiae* brief in *Saratoga* does not mean that the Nation has been heard on the merits of Respondents' challenge to the Nation's compact. The submission of an *amicus* brief in another party's case is not a waiver of the right to be heard in a case involving the party's own legal rights. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 583-84 (6th Cir. 2003). Nor is it a waiver of sovereign immunity permitting the adjudication of a party's rights in absentia. Furthermore, the Nation was limited in *Saratoga* both by the arguments made by the parties below and by the record in that case, which, as discussed above, was significantly different from the record in this case, particularly on the strength of the *laches* defense that should have been but was not presented in this case.

Oneida compact was approved but before approval of the Mohawk compact at issue in *Saratoga*) as putting the Mohawks on notice of the invalidity of their compact.

III. It Creates No "Vacuum" For State Courts To Be Unable To Pass Judgment On A Federally Approved Gaming Compact Because Whether A Federally Approved Gaming Compact Is "In Effect" Under IGRA Is A Federal Question.

Through a state law challenge to the governor's authority to enter into a gaming compact, Respondents have attempted to vest the state court with authority to review a federally approved gaming compact. They complain that giving effect to federally protected sovereign immunity will deprive state courts of this authority.

The flaw in Respondents' argument is that they ignore the limited role states may play in the regulation of Indian gaming. The legality of Indian gaming, including whether a gaming compact satisfies IGRA, is a question of federal law. Petition at 10 n. 4. The approval of a gaming compact by the Secretary of the Interior is subject to review in federal court under the Administrative Procedure Act. When an IGRA compact is challenged on the basis of the authority of the governor under state law to enter into the compact, federal courts have the authority to resolve any predicate question of state law, *West Virginia ex rel. Dyer v. Sims,* 341 U.S. 22, 30-32 (1951) (interstate compact not in violation of West Virginia constitution), or to certify the question to the state's highest court. *See Narragansett Indian Tribe v. Rhode Island,* C.A. No. 94-0618-T, C.A. No. 94-0619-T, C.A. No. 95-0034-T, 1996 U.S. Dist. LEXIS 11472, at *4 (D.R.I. Feb. 13, 1996).

Contrary to Respondents' submission, the federal government has not taken the position that state courts must determine whether an IGRA compact was entered into in compliance with state law. Respondents ignore the

significance of the timing of a state law-based challenge to the compact. While a challenge to the governor's authority to enter a compact, brought before federal approval of the compact, implicates primarily state law issues, *see State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (Kan. 1992), federal approval of the compact means that the compact is "in effect" for purposes of IGRA and any subsequent challenges to the compact present a federal question that must be resolved in accordance with the detailed provisions of IGRA.[3] The United States briefed this issue in *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997):

> Once in effect under federal law, the compacts remain in effect unless and until the Secretary's approval is withdrawn pursuant to federal law. A post-approval state high court judicial decision on a question of state law cannot by its own force render an IGRA compact no longer 'in effect' under federal law. Approval and publication by the Secretary is the critical event in the federal statutory scheme. To permit subsequent

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[3] Respondents have attached several letters from federal officials in an effort to demonstrate federal support for their position. These letters are not in the record and are not properly before the Court In addition, Respondents are mistaken both about the import of the letters and the deference accorded to them. In fact, the letters recognize that the only proper time to bring a purely state law challenge to the governor's authority to enter a compact is prior to federal approval. See BIO at A 32-33. In any event, informal letters are not entitled to *Chevron* deference from this Court. *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, -- U.S. --, 126 S. Ct. 1843, 1848 (2006)(expressions of agency understanding not entitled to *Chevron* deference); *Gonzalez v. Oregon*, -- U.S. --, 126 S. Ct. 904, 914-15 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 303-04 (2001) (Customs rulings not entitled to *Chevron* deference when not issued pursuant to delegated authority to make rules carrying the force of law).

> interpretations of state law by state entities to render a compact void or undo Secretarial approval would, in effect, allow one party to the compact to exercise unilateral power over its status, and would allow the states to preempt the federal scheme and would introduce uncertainty and potential chaos into a setting in which Congress intended IGRA to furnish stability. (Brief pp. 37-38).

That analysis echoes the words of this Court in "A State cannot be its own ultimate judge in a controversy with a sister state." 341 U.S. Ct., 28. Justice Jackson's concurrence recognized that "West Virginia, for internal affairs, is free to interpret her own Constitution as she will. But if the compact system is to have vitality and integrity, she may not raise an issue of *ultra vires*, decide it, and release herself from an interstate obligation." 341 U.S. at 35.

This Court in *Dyer v. Sims* recognized that the enforceability of an interstate compact presents a federal question for federal courts to decide, even when a state's participation is challenged under the state's own constitution. The same is true of the tribal-state compact system ordained by Congress, which binds tribal and state sovereigns within a federal regulatory scheme. Respondents' effort to circumvent the detailed review set out in IGRA by bringing a state law challenge, in state court, with neither the tribe nor the federal government present as a party, is incompatible with federal law.

IV. The Nation Appropriately Entered A Limited Appearance For The Purpose Of Asserting Its Sovereign Immunity And Moving To Dismiss On The Ground That It Is An Indispensable Party.

Finally, there is nothing "disingenuous" about a sovereign asserting its sovereign immunity and entering an appearance to insist that as a consequence of its sovereign immunity, the court may not litigate its interests. BIO at 12. The Nation did not challenge the Respondents' case on the merits – because of its limited appearance, the Nation could not raise the standing and *laches* defenses the state refused to present. Rather, the Nation did exactly what the United States and other sovereigns have done in similar circumstances. The Nation entered a limited appearance for the sole purpose of asserting that it is an indispensable party whose rights cannot be adjudicated because of its sovereign immunity. *See, e.g., Lazar v. Benson,* 156 F.Supp. 259, 261-62 (E.D.S.C. 1957) (Secretary of Agriculture made special appearance and moved to dismiss on the ground that he was an indispensable party); *see also Chen v. New Jersey,* 227 B.R. 614, 624 (D.N.J. 1998) (New Jersey could have avoided waiver of sovereign immunity by entering special appearance to contest the jurisdiction of the court); *Lamont v. Travelers Ins. Co.,* 281 N.Y. 362, 24 N.E.2d 81 (1939) (Mexico appeared specially and moved for dismissal for lack of jurisdiction).

Respondents assert that "[w]hile the Tribe can invoke sovereign immunity to get out of the case, in so doing it takes the risk that issues may be adjudicated in its absence." BIO at 12. That assertion simply restates the New York rule that tribes have no sovereign immunity in state court because they can intervene, and their refusal to do so is treated as a waiver of the right not to have their interests determined in their absence. If allowed to stand, the New York rule will mean, in practice, that an Indian tribe has no sovereign immunity. Forcing a sovereign to waive its immunity and appear in order to protect its interests eliminates the immunity altogether. This Court would not sustain state legislation that eliminated tribal sovereign immunity. It should not permit state courts to reach the same result under the rubric of state indispensable party rules.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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